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Some of the tendency of the courts to enlarge the scope of Sections 50 and 51 may be due to a confusion of terms. These statutes are ordinarily referred to as the "right of privacy" statutes. The same phrase is used by legal writers and by the courts of other states to define a very broad personal right, only partially recognized in most jurisdictions.¹⁹ Of this extensive right the New York statutes recognize only a small part.

It may be that public policy as influenced by changing social conditions necessitates the adoption of an unlimited right of privacy into the body of our laws. Until such time as the legislature sees fit to effect such a result our courts are bound to stay within the rigid confines of the statute as it now exists.

C. E. KLEINBERG.

WHEN IS MALPRACTICE BY A PHYSICIAN ACTIONABLE?

The cases interpreting the New York Statute of Limitation relative to malpractice actions¹ have proceeded in two main channels that are completely contradictory in their socio-legal philosophy.

One line of adjudication, determining the persons to whom the act refers, has narrowed it exclusively to practitioners of medicine, making the relationship between doctor and patient the salient point of application of this statute. The second line of interpretation, marking the accrual of the cause of action, has tended to lessen the chance of recovery by the patient for a doctor's negligence.

Malpractice has been quite forthrightly defined by the Court of Appeals. In a case where the defendants, public accountants, pleaded this statute as an affirmative defense against an action for negligently false accountings, the court said, "Section 50, subdivision 1, of the Civil Practice Act, in so far as it prescribes a limitation in actions to recover damages for malpractice, refers to actions to recover damages for personal injuries resulting from the misconduct of physicians, surgeons and others practicing a profession similar to those enumerated."²

¹⁹ Nizer, *The Right of Privacy* (1941) 39 MICH. L. REV. 526; Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S. E. 68 (1905); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Munden v. Harris, 153 Mo. App. 652, 134 S. W. 1076 (1911); Melvin v. Reid, 112 Cal. App. 235, 297 Pac. 91 (1931) (relief granted on grounds of constitutional guaranty); (1896) 31 L. R. A. 283; 18 Ann. Cas. 1017.

¹ N. Y. CRV. PRAC. ACT § 50. "Actions To Be Commenced Within Two Years. The following actions must be commenced within two years after the cause of action has accrued: (1) An action to recover damages for assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution or malpractice."

² Ultramares Corp. v. Touche, Niven, 248 N. Y. 517, 518, 162 N. E. 507 (1928).

All subsequent determinations of the classes that fell within this definition were based on Section 1250, subdivision 7 of the Education Law.³ In light of this definition it has been held that chiropractors may invoke this statute;⁴ pharmacists also come within its terms,⁵ as do X-ray technicians.⁶ However, nurses are not included.⁷

The cases are quite definite as to the application of Section 50(1) of the Civil Practice Act to a specific group. They are equally definite with respect to the time when the right of action accrues.

A cause of action in malpractice accrues at the time of the negligent act,⁸ not at the time the patient discovers the misfeasance or non-feasance. The time of accrual has been extended to include the period during which the physician continued to treat the patient for the ailment after the operation. In such an instance, it has been held, "Where the tort is continuing, the right of action is also continuing,"⁹ provided the plaintiff is able to prove at the trial that the injury caused continued during the treatments, and had not completely accrued at the time of the operation.

Most surprising has been the refusal of the court to give any weight to the fact that the defendant knew of his wrongful act. In *Tulloch v. Haselo*,¹⁰ the plaintiff tried to establish the base for an action in fraud, by alleging that the dentist negligently permitted an extracted tooth to go down the patient's throat and become lodged in her lung, and wilfully concealed this fact. The court stated, "At most, there was a breach of professional duty in the operation alleged to have been negligently performed and in the concealment of the negligent act." The court so held because there was no allegation that the dentist knew that the tooth had gone into the lung rather than into the stomach.

This closely-limiting interpretation for the accrual of the action has worked a hardship in some instances. In *Conklin v. Draper*¹¹

³ N. Y. EDUCATION LAW § 1250. "Definitions. As used in this article: 7. The practice of medicine is defined as follows: A person practices medicine within the meaning of this article, except as hereinafter stated, who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition."

⁴ *Monahan v. Devinny*, 223 App. Div. 547, 229 N. Y. Supp. 60 (3d Dep't 1928).

⁵ *Rudman v. Bancheri*, 260 App. Div. 957, 23 N. Y. S. (2d) 584 (2d Dep't 1940).

⁶ *Leitch v. Mulcahy*, 177 Misc. 1077, 31 N. Y. S. (2d) 874 (Sup. Ct. 1941).

⁷ *Isenstein v. Malcomson*, 227 App. Div. 66, 236 N. Y. Supp. 641 (1st Dep't 1929), modifying 133 Misc. 691, 234 N. Y. Supp. 52 (Sup. Ct. 1929).

⁸ *Conklin v. Draper*, 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't 1930).

⁹ *Sly v. Van Lengen*, 120 Misc. 420, 422, 198 N. Y. Supp. 608 (Sup. Ct. 1923).

¹⁰ 218 App. Div. 313, 218 N. Y. Supp. 139 (3d Dep't 1926).

¹¹ 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't 1930).

the plaintiff underwent an appendectomy, and the doctor left a pair of forceps in her abdomen. The operation was performed May 27, 1925. The patient continued suffering, and on a trip to England, an X-ray revealed that the forceps were the cause of her pain. An operation was performed July 13, 1927, and an action was brought a few weeks later. The defense of the statute of limitations was upheld.

The health of a community depends upon its doctors. They are compelled to make quick decisions and weigh procedures under great pressure because the pendulum of life and death frequently oscillates with their movements. The courts, fully appreciative of this strain, refuse to submit medical practitioners to petty lawsuits which may tend to force them into over-caution.

But we have failed to take into account the protection that should be afforded the patient against a negligent act. While most doctors today are insured against lawsuits for malpractice, there is no similar safeguard for the patient.

It must be recognized that the doctor-patient relationship is one of trust and confidence. Such trust and confidence, disarming the patient, would prevent discovery of malpractice within what would be the ordinary reasonable period of time. In one case where the physician deferred suit for his services for more than two years, the patient's counterclaim in malpractice was barred under the statute.¹²

A greater time is allowed for the recovery of damages for a negligent injury to person or to property.¹³ And for loss of one's property through fraud, one is given the chance to discover the fraud before the statute begins to run.¹⁴ Certainly, where one reposes his trust in a physician (and ordinary vigilance is at its minimum), one should have the chance to discover the wrong that was done him before the statute begins to run.

As the statute is now interpreted one must either suffer immediately from the professional misfeasance, or be forever barred from recovery, whereas in an action to recover damages for fraud in the conversion of personalty, the fraud must first be discovered before the statute will run.¹⁵

This disparity in remedies has been officially noticed. In 1942, the Law Revision Commission recommended the addition of a fourth

¹² *Fish v. Conley*, 221 App. Div. 609, 225 N. Y. Supp. 27 (3d Dep't 1927).

¹³ N. Y. CIV. PRAC. ACT § 49. "Actions To Be Commenced Within Three Years. The following actions must be commenced within three years after the cause of action has accrued: . . . 6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence."

¹⁴ N. Y. CIV. PRAC. ACT § 48. "Actions To Be Commenced Within Six Years. The following actions must be commenced within six years after the cause of action has accrued: 5. Any action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

¹⁵ *Lightfoot v. Davis*, 198 N. Y. 261, 91 N. E. 582 (1910).

subdivision to Section 51 of the Civil Practice Act. The changes recommended include (a) a one-year limitation on the action, which, however, (b) will not accrue until the malpractice is discovered, but limited (c) to no more than six years. This would seem to be the model answer to this problem. It allows a chance for action after discovery of the injury, but only for one year, in keeping with the general tendency to cut down the periods of limitation; and it meets the purpose of a limitation (since such statutes are statutes of repose) by allowing no action after six years.

But no legislative action has been taken on this recommendation as yet. Relief, if it is to come at all, seemingly must come from the judiciary.

Georgia has shown the way toward liberalization. The appeals court of that state has held that where a surgeon removes a vital organ, and fails to disclose the removal, it will constitute fraud.¹⁶ California has led the path toward increased protection for the patient. In 1936, a California court ruled that, when a surgeon failed to remove a drainage tube, the cause of action arose when the plaintiff discovered the tube in his body.¹⁷ However, this case was not a clear-cut renunciation of the strict interpretation generally followed, because in this case the patient continued to be treated by the surgeon.

California broke with both the past and the majority viewpoint in 1942. In one case a dentist left a root in the patient's mouth, causing infection. The court held that the cause of action accrues when the plaintiff knows, or by reasonable diligence should know, of the injury.¹⁸ And in another case, the defendant had made a plaster cast of the plaintiff's ear, some plaster had been left in the ear, and the plaintiff did not discover this until ten months later; the court held that the statute ran from the time of the discovery, saying, "It is the general rule that in tort actions the statute of limitation runs from the date of the act causing the injury . . . There is a recognized exception to this rule in California, which is: That if a foreign substance is negligently left in the human body by a defendant, the statute of limitation does not commence to run until the plaintiff has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered it."¹⁹

Nor are we completely devoid of a similar legal outlook in our own jurisdiction. In *Conklin v. Draper*,²⁰ Justice O'Malley's dissent pointed the way, asserting that the knowledge of the defendant, and the lack of knowledge of the plaintiff made this an act of continuing malpractice, against which the statute of limitation would not com-

¹⁶ *Tabor v. Clifton*, 63 Ga. App. 768, 12 S. E. (2d) 137 (1940).

¹⁷ *Huysman v. Kirsch*, 6 Cal. (2d) 302, 57 P. (2d) 908 (1936).

¹⁸ *Ehlen v. Burrows*, 51 Cal. App. (2d) 141, 124 P. (2d) 82 (1942).

¹⁹ *Pellett v. Sonotone Corp.*, 55 Cal. App. (2d) 158, 130 P. (2d) 181, 182 (1942).

²⁰ 229 App. Div. 227, 241 N. Y. Supp. 529 (1st Dep't 1930).

mence to run until either the defendant performed his duty or the plaintiff learned or should have learned of said condition. If such were the law, the medical profession would properly be held to the obligations and duties that are a necessary counterpart to the high position they have assumed in our society. Since the statute does not run from the time of discovery, but from the act of negligence, the present two-year limitation is too short. The legislature has not acted. It remains for the judiciary to assume its ancient function of pointing the way for the law to meet society's progress.

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